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on behalf of the
National Stone, Sand & Gravel Association

Testimony Before

The Committee on Resources
United States
House of Representatives

On
HR 2933
The "Critical Habitat Reform Act
Of 2003"

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Introduction

Good morning. I am Steven L. McKeel, Manager of Natural Resources for the Southeast Division of Martin Marietta Materials, Inc. Thank you for the opportunity to testify before you today in support of H.R. 2933, the "Critical Habitat Reform Act of 2003".

Martin Marietta Materials, Inc. is the second largest producer of crushed stone, sand and gravel in the United States. Our Aggregates Division operates more than 300 quarries and distribution facilities in 28 states, the Bahamas and Nova Scotia. Our products are used extensively in concrete for road and other construction, asphalt, railroad ballast and numerous other basic products that form the literal foundation of our infrastructure and economy.

I graduated from the University of North Carolina, Chapel Hill, with a bachelor's degree in Geology in 1982. I worked in the precious metals mining industry for a few years before joining Martin Marietta Materials, Inc. as a geologist in 1985. I became Manager of Natural Resources of the Southeast District in 1990, and with the growth of our company I moved to Atlanta, Georgia, in 1996 into my current role of manager of Natural Resources for the Southeast Division. The Southeast Division currently oversees some 40 quarry and 20 distribution operations.

In early 1990, I became closely involved with a company project that involved two federally listed plant species. Through this experience I was invited to serve on the National Stone Association's Environmental Committee as their Wetlands and Endangered Species Task Force Chairman, which I did for about seven years. I was also fortunate to later serve as Vice Chair and also Chairman of the Environmental Committee. The National Stone Association subsequently merged with the National Aggregate Association in 2001 to become the National Stone, Sand, and Gravel Association, and it is on their behalf that I relate to you this morning the experiences I had with the ESA in the early 90's.

The National Stone, Sand & Gravel Association is the world's largest mining association by product volume, representing companies who produce over 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the U.S. at over 10,000 operations by approximately 120,000 working men and women in the aggregates industry. During 2002, a total of about 2.73 billion metric tons of crushed stone, sand, and gravel, valued at $14.6 billion, were produced and sold in the United States. The aggregates industry directly and indirectly contributes a total of $37.5 billion annually to the nation's Gross Domestic Product (GDP). NSSGA's Environmental Guiding Principles encourage members to meet all established environmental regulatory requirements, and where possible to do more than the law requires.

Having operations in all 50 states, in virtually every Congressional District, the aggregates industry is significantly impacted by the Endangered Species Act (ESA). NSSGA supports improving the ESA by incorporating scientifically-based programs that implement a balanced approach to protect endangered species while recognizing private

property rights and the need for continued economic growth and responsible utilization of natural resources.

I would like to commend you on your efforts to reform and clarify a law that has become a hazy quagmire for many industries and private landowners alike. During my stint with the Environmental Committee of what is now NSSGA, there were a number of attempts by members of Congress to reform a law that, by promulgation and interpretation by federal agencies, often treads heavily on the basic private property rights of private landowners. This was true for my experience in the early 1990's, and it remains true to this day.

Leasing Private Property

In 1988, I began negotiations with a family of landowners for Martin Marietta Materials, Inc. to lease for the purpose of quarrying a 700-acre parcel of property located near Augusta, Georgia. The 700-acre lease property lay adjacent to a property owned by the Nature Conservancy. I learned late in the lease negotiation process that the Nature Conservancy had also entered into negotiations with the family in an attempt to buy a portion of this land and have the remaining property donated to them for favorable tax considerations. Our lease proposal to the landowners provided for both an annual payment for the leasehold of their property, plus a sum for every ton of material mined and sold from their property. This lease arrangement made the most economic sense to the landowners, and we executed a mining option and lease in September of 1989. The landowners retained about 300 acres of land outside of the 700-acre lease premises.

The Nature Conservancy's as well as our own interests lay in the fact that the property contained a 40-acre continuous exposure, or "pavement outcrop", of granite rock. The Nature Conservancy also owned the adjacent parcel of land that contained a larger, perhaps 100-acre outcrop known as "Heggie's Rock" which lay some three-fourths mile from the 40-acre outcrop under lease. A portion of the 700-acre lease premises bounded part of this large granite exposure. Martin Marietta Materials, Inc. owned the 100-acre outcrop, "Heggie's Rock", in the 1970's. Company files I have from that time indicate that we were instrumental in having this property become a nature preserve.

The Nature Conservancy had also indicated to the landowners during our lease negotiations that there were endangered plant species located on the 700-acre lease premises. Martin Marietta Materials, Inc. initiated contact and a site visit with the Nature Conservancy in July of 1989 to assure them our mining activity would have no detrimental impact to their property. It was through this site meeting with their consulting biologist that we learned of two federally listed plant species that existed on the lease premises, and indeed existed on the 40-acre granite outcrop itself.

Our initial findings at this planning stage of the process were informative and generally cordial. There were discussions involving relocating the listed species versus mining around them, and other possible alternatives. I later contacted state agencies that assured

me plants were treated differently than animals under the ESA, and that these two plant species had been successfully transplanted in the past.

Granite Outcrops in the Southeast

Exposed bedrock of any kind in the southeastern United States is quite rare. There are, however, a number of exposed granite bodies, or "pavements", that occur in South Carolina, Georgia, and Alabama. A number of these are concentrated in the Atlanta, Georgia area. These exposed rock bodies are generally semi-circular in appearance and can range in size from a few square feet to many square acres. The most famous of these is perhaps the tourist attraction of Stone Mountain near Atlanta, Georgia, which is a several hundred-acre exposed, dome-shaped granite outcrop rising a few hundred feet above the surrounding landscape.

Granite is a generally a well suited source material for crushed stone. The physical characteristics of granite generally exceed all state specifications for road and other construction projects. Only about 15 percent of the total crushed stone output in the US is derived from granite, but about 70 percent of this output is mined in just five southeastern states.

In many quarry locations, rock suitable for crushed stone production lies under many feet of soil that requires costly removal before processing can commence. This 40-acre exposure of granite on the lease premises was readily available, quality stone, representing a viable resource to our company and a valuable commodity to our landowner. Conversely for our landowner, this 40-acres of exposed granite had no potential developmental value other than for crushed stone mining purposes. Mining was unequivocally the "highest and best use" for this property.

However, in addition to being a source of crushed stone, these outcrops also represent an isolated and unusual habitat, particularly for plant species. Shallow, saucer-shaped depressions or "pools" have formed over time on the level portions of these granite outcrops. These pools are generally no more than five square meters in size, and alternately fill with water during rainy periods or completely desiccate during dry periods. A number of unique plant species are endemic to these pools, including the federally listed endangered Isoetes tegetiformans, or "mat-forming quillwort", and the federally listed threatened Amphianthus pusillus, or "snorklewort". The quillwort is known to exist in some eight localities in Georgia, and the snorklewort some 55 localities in Georgia, South Carolina, and Alabama.

Wetlands and the ESA Process

I rezoned the entire 700-acre lease property to an M-1 (Mining) designation through provisions of Columbia County, Georgia zoning ordinance in the fourth quarter of 1989 and 1st quarter of 1990. The Columbia County Land Use Plan, developed a few years prior to this rezoning, had already, in anticipation, designated the general location of this property as crushed stone mining because of its suitability for mining, as demonstrated by

one of our competitors located nearby. In other words, the county recognized that crushed stone mining on this property was both the highest and best use for the property as well as a conforming use.

The 700-acre lease parcel was completely transected by two significant drainage basins. The area between the two drainages, where the 40-acre granite outcrop occurred, was to be the focus of our mining operation. The first of these two drainages had to be crossed in order to access the granite outcrop from a public road.

In July of 1990, I submitted a pre-discharge notification to the U.S. Army Corps of Engineers (Corps) for wetlands permitting for separate impacts on the two drainages transecting our 700 acre parcel – one 0.48-acre impact for access into the site across the first drainage, and a second 0.92-acre impact for a freshwater pond and erosion control measures on the second major drainage. I requested that the two areas be treated separately under what was, at that time, separate permits under Section 14 and Nationwide 26 of the regulation. Included in that application was a wetlands delineation by our consultant for both drainage basins. A Corps of Engineers biologist had verified the wetlands delineation in May of 1990 prior to the July notification. We made the Corps biologist aware of the possible presence of listed species on the property. Since each impact was less than one acre, I requested that the Corps' authorize by letter the use of these permits.

In response, and in light of the possible presence of endangered plants, the Corps recommended by phone that we conduct a biological inventory of the site and begin informal consultation with the U.S. Fish and Wildlife Service (FWS). I began to undertake both of these recommendations in late August of 1990. The Corps also indicated they considered the two wetlands impacts to be one impact under Nationwide 26.

In November of 1990 I informed both the Corps and the FWS that our outside consultant had completed the "Habitat Evaluation Survey for Threatened and Endangered Plant Species" for our 700-acre lease premises. I scheduled a site visit with the FWS for early December of 1990. The FWS requested that an outside biologist with expertise also attend the site meeting, and I agreed. I was surprised to learn that the consulting biologist in attendance was the same individual employed earlier by the Nature Conservancy.

Two pools within a few feet of each other were identified on the granite outcrop by our consultant, one containing Amphianthus pusillus and the other containing Isoetes tegetiformans. The FWS consulting biologist also verified these occurrences. The pools were located in a portion of the granite outcrop that could not be set aside as possible buffer zone. It became painfully transparent from this meeting that I had a vastly different view of mitigating impact to these species than the FWS and this consulting biologist. The FWS wanted the species to remain intact rather than be relocated.

The informal consultation process with the FWS began to drag on into the first quarter of 1991 with no written response or recommendation. It became increasingly clear to me

that our corporation needed to establish our legal rights with regard to this process. As a larger aggregate producer, we were fortunate to have the financial ability to seek excellent legal council on this matter where so many other landowners might not.

In March of 1991 I informed both the Corps and FWS by letter of our legal findings, i.e., that 1) the takings provision of the ESA are more limited regarding listed plants species and do not prohibit the landowner or Lessor from relocating or even destroying the plants, 2) the wetland crossing of the first drainage and impoundment on the second drainage should be treated separately by the Corps under Nationwide 14 and 26, respectively, and that for the Corps to call the wetland crossing a "crossing/impoundment" in order to place it under Nationwide 26 was inaccurate, and 3) the listed plants did not occur in wetlands or lands under federal authority, and that the plants were considered the property of the landowners and could be essentially removed or destroyed by mining independent of a Corps permit, which essentially negated the relevance of FWS consultation. I requested that the Corps reply within 20 days as specified under 33 CFR 330.7(3), otherwise we would assume that in light of our legal opinion all conditions of 33 CFR 330.5 (b) (3) regarding listed species had been met, and we would be free to proceed under Nationwide 14 and 26. I further reiterated our desire and our landowners desire to work with agencies to preserve and relocate these species, and went on to outline a plan where we would avoid mining the pools for two years as well as fund the relocation of the listed species.

The Corps responded by treating the pre-discharge notification as official, and through the agency coordination process the FWS made formal comment to the Corps dated March 21, 1990, that, by our own consultant's findings and the FWS site visit, two listed species had been verified on the proposed quarry property. The FWS thereby requested that the formal Section 7 consultation process be triggered, with a 90-day consultation process and a Biological Opinion to follow within 45 days. Apparently, none of the progress made during the several months of informal process applied in any way towards reducing this time frame. The Corps informed us on March 29, 1990, that as per FWS request, the Corps would postpone determination of this application until the consultation process was completed.

On May 19, 1991, in response to the formal consultation process, I mailed a very detailed letter to the FWS outlining crushed stone mining practices and procedures. I also illustrated by cross-section and mine reserve calculations the very significant economic impact the plants would have on our operation if we were forced to leave them in place. A few of the more significant impacts were 1) the reduction of our overall minable reserves by 15 or more million tons, which represented a market value of some $60-70 million, 2) the reduction of the life of our mine by 15 to 20 years, forcing us to seek another mine location prematurely, and 3) the cost to our landowners of several million dollars in royalties on the sales of rock measuring 15 million tons less than anticipated.

I also learned in May of 1991, quite by circumstance, that the FWS and State of Georgia had entered into a cooperative agreement in April of 1990 for the purpose of preparing a Recovery Plan for three granite outcrop plant species – including the mat-forming

quillwort and the snorklewort. The cooperative agreement was signed by the FWS on January 3, 1990, coincidentally just a few short months after I began informal consultation with the FWS on these plant species. I requested and received a copy of the Technical Draft, which was a thinly veiled attack on the crushed stone industry as one of the main factors in the continued demise of outcrop plant species. The report was written, coincidentally, by the same consulting biologist who had visited our site with the nature Conservancy and the FWS the prior year.

On July 17, 1991, the FWS issued a jeopardy opinion for the Isoetes tegetiformans, or mat-forming quillwort, for our wetlands crossing permit application to reach the 40-acre granite outcrop on our lease premises. The opinion drew heavily from the Draft version of the Recovery Plan – a plan that had not been subjected to either the Agency Draft review process or the 60-day written public comment period during the Final Draft review process. Due to the less perilous "threatened" status of the Amphianthus pusillus, a non-jeopardy opinion was rendered in regard to it. However, the opinion went on to state that the endangered Isoetes tegetiformans was historically known to occur in both pools, so therefore both should be protected under this action.

As per the process, the opinion recommended Reasonable and Prudent Alternatives, which were, in brief:

1. No mining activity could be conducted within a 100-foot perimeter or buffer of the two pools, and the buffer area in question to be placed in a permanent conservation easement,

2. A six-foot chain-length fence composed of non-corrosive materials with silt fence to be placed around the perimeter of the buffer area,

3. And, by personal communication with the biologist authoring the Recovery Plan, it was determined that even a small amount of quarry dust build-up in the pools could affect the plant species, therefore an industrial fan should be mounted above the fence to blow across the pools during all times of quarrying activities,

4. Since the avoidance of quarrying of the pools will result in a isolated column of granite in the pit [I suppose the FWS envisioned we would leave a butte in the middle of the pit like you might see naturally in Utah or Montana], there needed to be some type of stairway or access up to the pools for monitoring and fan maintenance.

5. And lastly, the plants were to be monitored and logged on a weekly basis with results submitted to the FWS for the life of the quarry.

The Jeopardy Opinion went on to recommend, under "Conservation Recommendations", that since the survivability of both species at this site was not predictable, a separate site containing both species should be acquired and protected by transference into conservation hands, such as the Nature Conservancy.

These Reasonable and Prudent Alternatives would be laughable if they did not represent so much time and expense to the applicant, a travesty to the private property rights of the landowner, and the continued drain of taxpayer dollars for such endeavors by government agencies.

Resolution

In the fall of 1991, I began negotiations with our landowners on the 300 acres originally omitted from our lease premises. We were able to reach an agreement on a right-of-way to the public road that essentially skirted around the first drainage basin and all wetlands. This added nearly a mile of additional road construction for us, some additional annual rental payments, and also consumed a number of acres of land that the landowners might have used for other purposes.

On January 24, 1992, we formally withdrew our pre-discharge notification to the Corps and likewise notified the FWS. I notified our landowners of our decision, and of our continued interest in seeking avenues for the possible relocation of these species through various agencies and botanical gardens. Groups that had once demonstrated a strong interest now began closing doors on our negotiations; even given the fact we had withdrawn the wetlands permit application.

On March 1, 1992, I received a letter from the property owners, which I will read in part:

> "I appreciate your efforts to working out a solution to our problems with the endangered or threatened plants with the various organizations that should have had an interest in their relocation. After personally discussing the problem with several people that have expertise in this area, we concluded we would receive no help from these individuals or their organizations.
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> …it was decided it would be in our best interest to transplant the plants to [our] outcrop located adjacent to Heggie's Rock. The plants seem to be surviving quite well in the new habitat.
>
> …It is our hope that Martin Marietta can move forward with the necessary permitting to put this property in a state of production. We feel the delays have cost us a considerable amount of monetary consideration and mental anguish."

We then began a two year, strongly contested mining permit process with the State of Georgia. A number of opponents to our mining permit were from the ranks of individuals that originally not want to see the plant species relocated. Included were several negative newspaper articles from the original biologist who was also the author of the Recovery Plan.

In January of 1994, Martin Marietta Materials, Inc. received all mining permits from the State of Georgia for this site. We are in continuous operation at this location today. It

should be noted that once the species were documented as removed from the subject mining area, we were granted in 1995 a Corps permits (i.e., Nationwide 26 under one acre) for an impoundment along the second of the two drainages.

Conclusion

After all this effort on the part of landowner and government agency alike, I simply must question a process that encourages federal government agencies to attempt to rigidly regulate plant species that are obviously the property of the private landowner. The interests of the wetlands permit applicant were not served, and the interests of the landowner certainly were not served, and, because this delicate species was relocated by a private landowner with a shovel and bucket rather than by a professional botanist, ultimately the interests of the plant species were not served.

In my research during this project I came across Senate Report No. 100-240 (1988 U.S.C.C.A.N. 2700 at pages 2711-12) describing the purpose of additional language added in 1988 to Subsection B of the ESA, regarding animals and plants under federal jurisdiction. It reads, it part,

> Currently anyone who captures, kills or otherwise harms an endangered animal commits a violation of the Act for which substantial criminal and civil penalties may be imposed. By contrast, it is not unlawful to pick, dig up, cut or destroy an endangered plant unless the act is committed on Federal land; and even on Federal land there is no violation of the Act unless the plant is removed from Federal jurisdiction. The basis for this differential treatment of plants and animals under the Act was apparently was the recognition that landowners traditionally have been accorded greater rights with respect to plants growing on their lands than with respect to animals. The amendment made to the Act… does not interfere with the rights traditionally accorded landowners but instead reinforces them in a way that also benefits the conservation of endangered plant species…Endangered plants have been vandalized or taken from private land against the wishes of landowners. Most private landowners take pride in the presence on their lands of unique or rare species and are eager in their protection.

If indeed this was the intent of Congress, then the ESA failed miserably in our case. I seriously doubt if our landowner has much "pride" left in the fact that these species occur on his property.

With almost fifteen years of hindsight, I can look back on this episode and see the naivety of my actions. I mistakenly believed for nearly two years that the ESA actually worked to protect listed species. I was naïve to believe that, when confronted with the legal rights of ownership afforded the private property owner, governmental agencies and environmental groups alike would be willing to work towards a "Win-Win" solution to transplant and protect the plant species. I came away from this episode believing that the ESA has placed an adversarial tool in the hands of environmentalists who are bent upon curtailing growth by impinging on private property rights.

I strongly support HR 2933, the Critical Habitat Reform Act of 2003, introduce by Congressman Richard Baker, especially those provisions found at Section 3, which require that an economic impact analysis be conducted prior to designating species critical habitat. In the above-mentioned case, economic feasibility should have been drawn into question long before the numerous steps taken to issue biological opinions were conducted. The jeopardy opinion rendered in our case should have never been allowed to consult a Draft Recovery Plan when making a determination.

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